In the

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 707.

BENJAMIN W. FREEMAN,
Petitioner,

v.

BEE MACHINE COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT.

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BEE MACHINE COMPANY, INC.,
RESPONDENT.

BRIEF FOR RESPONDENT.

I. STATEMENT OF THE CASE.

So far as now material, the facts of this case are:

Respondent, plaintiff below, a Massachusetts corporation, on February 3, 1941 brought an action at law against petitioner, defendant below, a resident and citizen of Ohio, in the Superior Court of the Commonwealth of Massachusetts—a court of general jurisdiction (R. pp. 1–6). Personal service was made on the petitioner Freeman while temporarily within the Commonwealth of Massachusetts (R. pp. 1-2). The action was started by service of the writ (R. pp. 1-2). On "the first Monday of March next" (1941), return day of the writ, (R. p. 2) plaintiff's Declaration was filed—in accordance with Massachusetts practice. The Declaration (R. pp. 3–6) alleged breach by petitioner of the express and implied terms of a certain patent license agreement entered into between the parties on November 29, 1933, the

petitioner Freeman being the patent owner and licensor, and respondent the licensee. Petitioner, appearing specially (R. p. 6) removed the action to the United States District Court for the District of Massachusetts, because of diversity of citizenship of the parties and the requisite jurisdictional amount (R. pp. 6-9). Petitioner filed his Answer in the District Court (R. pp. 10-12). Petitioner then moved for Summary Judgment dismissing the action as *res adjudicata* (R. pp. 13-14) by reason of the judgment of the United States District Court for the Southern District of Ohio in an action brought by respondent against petitioner to enjoin cancellation of the license agreement—wherein judgment was entered in favor of petitioner and affirmed by the Circuit Court of Appeals for the Sixth Circuit (R. pp. 14-56). Before the hearing on the Motion for Summary Judgment, respondent moved in the District Court to amend its original Complaint to add an Action for Treble Damages under the Anti-Trust laws of the United States—service of a copy of the Motion being made on petitioner's attorney of record (R. pp. 56–58).* Petitioner's Motion for Summary Judgment was granted by the District Court, and Respondent's Motion to Amend the Complaint was denied on the ground of *lack of jurisdiction* of the Federal District Court, and Final Judgment was entered dismissing the Complaint (R. pp. 59-66). Respondent appealed and the Circuit Court of Appeals for the First Circuit affirmed the judgment which dismissed the original Complaint as *res adjudicata,* but reversed it insofar as it denied Respondent's Motion to Amend its Complaint. The Court of Ap-

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* The nature of respondent's claim in this respect is set forth in its Amended Complaint (R. pp. 56–58). It seeks damages for petitioner's illegal restraint of trade in *unpatented* cut-out dies, outside of his patent monopoly, and for abuse of his patent privileges—the same situation involved in *Altvater* v. *Freeman,* No. 696, now before this Court.

peals held that the Federal District Court *had jurisdiction* of the action under the Anti-Trust laws of the United States, but since the District Court had not exercised its discretionary power under Rule 15(a) of the Rules of Civil Procedure to allow or disallow the Amendment to the Complaint, remanded the case for the exercise of the District Court's discretion and further proceedings not inconsistent with its Opinion (R. pp. 68-76).

On March 15, 1943 this Court granted a writ of certiorari. Following the Mandate of the Circuit Court of Appeals, respondent renewed its Motion in the District Court to Amend its Complaint by adding the Action under the Anti-Trust laws of the United States, in the exercise of the discretion of the District Court—but hearing of the Motion has been suspended pending the decision of this Court on the jurisdictional question.

II. THE DECISION OF THE DISTRICT COURT.

The District Court held (Opinion, R. pp. 63-65; 42 F. Supp. 938), since the State Court of Massachusetts had no jurisdiction over the action based on the Anti-Trust laws of the United States, that (R. p. 65):

> "The jurisdiction of the Federal court in an action removed from the State court is derivative, and if the State court was without jurisdiction to entertain the cause of action set up in plaintiff's motion, then this court is also without jurisdiction.
>
> *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U.S. 377, 382;
>
> *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U.S. 261, 286.
>
> *Carroll* v. *Warner Bros. Pictures, Inc.*, 20 F. Supp. 405.

In the *General Investment Co.* case the court observed (page 288):

> " 'When a cause is removed from a state court into a federal court the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated.' "

The decision of the District Court, therefore, would require Respondent to bring its action under the Federal Anti-Trust laws in the Federal Court of Ohio (petitioner's residence) or again to obtain personal service on petitioner if he could be found again within the Commonwealth of Massachusetts. Petitioner could thus avoid the jurisdiction of the Federal Court of Massachusetts by remaining outside the Commonwealth, although the Federal Anti-Trust laws expressly permit such suit to be brought "in the district in which the defendant resides or is found or has an agent." *

III. THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The Court of Appeals (Opinion R. pp. 68 at 73-75; 131 F.(2d) 190 at 193-5) pointed out that the authorities relied on by the District Court, such as:

> *Lambert Run Coal* v. *B. & O. R.R. Co.*, 258 U.S. 377, 382 (1921);

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* Title 15, U. S. Code, Sec. 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, Sec. 4, 38 Stat. 731)."

General Investment Co. v. *Lake Shore & M. S. Ry. Co.*, 260 U.S. 261, 288 (1922);

Minnesota v. *United States*, 305 U.S. 382, 388-9 (1938);

were not in point, and did not apply to the present situation, *where the State Court had jurisdiction over the action as it stood in that Court.* Accordingly, it refused to follow the decision of the three other District Courts (and the Court below) which have held to the contrary:

Carroll v. *Warner Bros. Pictures, Inc.*, 20 F. Supp. 405 (D.C.S.D.N.Y. 1937);

Noma Electric Corp. v. *Polaroid Corp.*, F. Supp. ; 2 Fed. Rules Dec. 454, 54 USPQ 138 (D.C.S.D. N.Y. 1942).

Howe v. *Atwood*, 47 F. Supp. 979; 55 USPQ 177 (D.C.E.D. Mich. S.D. 1942).

The Court of Appeals (Judge Woodbury) said (R. pp. 74-75):

"The Supreme Court in the cases cited above had under consideration the situation presented when *an action over which a state court had no jurisdiction was removed to a federal court,** and it held that, the state court having no jurisdiction, the federal court could acquire none upon removal, even though the federal court would have had jurisdiction, if the action had originally been brought in that court. The reason for this rule appears to be that because of lack of jurisdiction there was, legally speaking, no action pending in the state court and hence no action which could be removed to the federal court.

But in the case at bar, as well as in the *Carroll and*

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* Emphasis ours throughout this Brief.

Noma Electric Corp. cases, *the state court had jurisdiction over the action as it stood in that court and hence there was pending before it an action which could be removed.* The question here presented is whether, after the removal of the action, it can be amended by adding a claim which the federal court has jurisdiction to try but, which the state court would have lacked if the claim had been advanced while the action was there pending. *The reason for the Supreme Court rule clearly fails in cases like the present.*"

ARGUMENT.

IV. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CORRECT.

This case presents the question:

Where a State Court has jurisdiction of both the subject matter and the person of the defendant in an action, in which the Federal Court has concurrent jurisdiction of subject matter (because of diversity of citizenship and the requisite jurisdictional amount) and the defendant removes the action to the Federal Court, does the Federal Court have jurisdiction to permit amendment of the complaint to add a new claim over which the Federal Court has exclusive jurisdiction as to subject matter, and hence which could not have been brought in the State Court?

We submit that the question can only be answered in the affirmative and that the decision of the Circuit Court of Appeals is correct, and in accord, rather than in conflict, with the applicable decisions of this Court. The decisions of the Federal District Courts to the contrary are obviously incorrect.

The Massachusetts State Court, of course, had jurisdiction of the *original* action for breach of contract brought therein—jurisdiction of the *subject-matter*, under its general jurisdiction and power—and jurisdiction of the *person* of the petitioner Freeman, by reason of personal service of process on him while within the Commonwealth. *The State Court thus had full jurisdiction and power to act in the original action, and to render a valid judgment. Restatement, Judgments*, Secs. 1, 4, and 15.

The United States District Court for the District of Massachusetts likewise had jurisdiction of the *subject matter* of the original action,—because of the diversity of citizenship of the parties and the requisite jurisdictional amount—Federal Constitution, Art. III, Sec. 2; Title 28,

U.S.C. Sec. 41 (1). The Federal District Court thus had *concurrent jurisdiction* with the Massachusetts State Court in the subject matter.* The original action *could have been brought* as well in the Federal District Court—Title 28 U.S. C. Sec. 112, which permits such an action to be brought in the district of residence of either the plaintiff or the defendant.** Jurisdiction over the person of the petitioner by personal service on him within the District only was necessary to give the District Court venue.

Petitioner, however, removed the original action from the State Court to the Federal District Court, as he had a right to do—*Title 28, U.S.C.* Sec. 71. Then he filed his Answer in the Federal District Court and a Motion for Summary Judgment dismissing the action as *res adjudicata. This, of course, constituted a general appearance and conferred jurisdiction on the Federal Court over his person, by consent, and thereby he submitted himself to the venue and jurisdiction of that Court.*

Western Loan & Savings Co. v. *Butte & Boston Co.*, 210 U.S. 368 at 372 (1907).

Houston v. *Ormes*, 252 U.S. 469 at 474 (1919).

American Surety Co. v. *Baldwin*, 287 U.S. 156 at 165 (1932).

Restatement, Judgments, Secs. 18 and 19.

Restatement, Conflict of Laws, Secs. 81 and 82.

Beale, Conflict of Laws, Sec. 82.1 and cases cited.

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* *Neirbo Co.* v. *Bethlehem Ship Building Corp.*, 308 U. S. 165 at 171 (1939).

** Title 28 U.S.C. Sec. 112, provides in part:
"no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant;"

As regards jurisdiction and venue, the situation then became the same as if the original action had been brought in the Federal Court in the first place and personal service made upon the defendant in the District of Massachusetts. The Federal District Court thus had jurisdiction of the subject matter, and acquired jurisdiction of defendant's person, and hence had full jurisdiction and power to impose a personal liability or obligation upon the defendant and to render a valid judgment, both on the original claim and on any other which by its rules or statutes may be brought against a defendant properly within its jurisdiction. Having such jurisdiction of the subject matter and of the defendant, the District Court properly could permit the plaintiff to add such Federal claims as it might have against defendant. *There can be no question this was permissible under the Federal Rules of Civil Procedure.*

A. A case removed to the Federal Court on the ground of diversity of citizenship is, of course, expressly made subject to the statutes and rules applicable to the Federal Courts, after such removal.

Title 28 U.S.C. Sec. 81 expressly provides:

> "*The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court,* and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

Rule 81(c) of the Rules of Civil Procedure provides:

> "81(c) REMOVED ACTIONS. These rules apply to civil actions removed to the District Courts of the United States from the State Courts and *govern all procedure after removal.* Repleading is not necessary unless the court so orders."

In the following removed cases procedural rights after removal were held determined by the Statutes and rules applicable to actions in the Federal Courts, as if the action had been brought there originally:

In *Ex Parte Fisk*, 113 U.S. 713 (1884) the right of examination of a party before trial permitted by New York statute, was held no longer available in an action at law, after removal, because in conflict with statutes of the United States regulating mode of trial in the Federal Courts. Mr. Justice Miller said (p. 726):

> *"The petitioner having removed his case into the Circuit Court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed."*

In *King* v. *Worthington*, 104 U.S. 44 (1881), the competency of witnesses was determined by applicable Federal Statute, although the witnesses would have been incompetent in the State Court. Mr. Justice Woods said (p. 51):

> "The Federal Court was bound to deal with the case according to the rules of practice and evidence prescribed by the acts of Congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal court give him."

In *Hurt* v. *Hollingsworth*, 100 U.S. 100 (1879), joinder of equitable and legal causes of action, permitted by Texas statute, was held no longer available after removal, because in conflict with Federal statute regulating procedure in the Federal courts at that time.

In *Northern Pacific Railroad* v. *Paine*, 119 U.S. 561

(1886) an equitable defense to an action at law, permitted by Minnesota statute, was held no longer available after removal, under the applicable Federal statute of that time.

In *Lehigh Valley Railroad Co.* v. *Rainey*, 99 Fed. 596 at 597–8 (C.C.E.D. Pa. 1900), a defense based on United States laws regulating interstate commerce was held available, and did not oust the Federal Court of jurisdiction, although it could not have been raised in the State Court.

In *Newberry* v. *Central of Ga. Ry. Co.*, 276 F. 337 at 338 (C.C.A. 5, 1921) an amendment to a complaint after removal alleging that defendant was engaged in interstate commerce was held not to oust the Federal Court of jurisdiction, although if it had been made in the State Court, it would have prevented removal, under the Federal Employer's Liability Act (Title 45 U.S.C. Sec. 56).

In *Henning* v. *Western Union Tel. Co.*, 40 F. 658 at 658–9 (C.C.D.S.C., 1889) the plaintiff was required to provide security for costs, although it could not have been required in the State Court.

In *Miller Parlor-Furniture Co.* v. *Furniture Workers' Union*, 8 F. Supp. 209 at 209 (D.C.D.N.J., 1934), a labor case, after removal was held subject to Federal Statutes governing issuance of restraining orders.

See also:

Borton v. *Conn. General Life Ins. Co.*, 25 F. Supp. 579 at 579 (D.C.D. Neb. 1938).

Meehan v. *Schenley Distillers Corp.*, 27 F. Supp. 989 at 989 (D.C.S.D. N.Y., 1939).

The same rule is held, specifically, to apply to amendments of the complaint, after removal. See *Salyer* v. *Consolidation Coal Co.*, 246 F. 794 at 796 (C.C.A. 6, 1918).

B. The Federal District Court, of course, has jurisdiction of the subject matter in an action under the Anti-trust laws of the United States—*Title 15 U.S.C.* Sec. 15 (*supra*, p. 4);

Title 28 U.S.C. Sec. 41 (23); *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U.S. 436, 440 (1919). It is immaterial that the State Court had no jurisdiction of that subject matter, as the action under the Federal Anti-trust laws was not being brought in the State Court.

C. Rule 18 (a) of the Federal Rules of Civil Procedure expressly permits the plaintiff or defendant to

> "join either as independent or as alternate claims, as many claims, either legal or equitable or both, as he may have against an opposing party."

It is thus the policy of the Federal Courts to clear up in one action as many claims as one party has against the opposing party, rather than requiring separate and piecemeal actions in separate courts.

D. The Federal Rules of Civil procedure likewise permit "every pleading subsequent to the original complaint" to be served upon the attorney of record of the opposing party when he is so represented by an attorney. Pleadings "asserting new or additional claims for relief" are required to be *personally* served only when the opposing party is in default "for failure to appear". Rule 5(a) and (b) provides in part:

> "Every order required by its terms to be served, *every pleading subsequent to the original complaint . . . shall be served upon each of the parties affected thereby,* but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.
>
> (b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney *the service shall be*

> *made upon the attorney* unless service upon the party himself is ordered by the court. *Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address* or, if no address is known, by leaving it with the clerk of the court."

Service of the amended complaint adding the action under the Federal Anti-trust laws herein was made on Petitioner's Attorney of record (R. pp. 56–58).

There can thus be no question that *procedurally*, under the Rules and Statutes applicable to suits in the Federal Courts, whether brought therein originally, or removed thereto from a State Court, the Federal Court had the jurisdiction and authority to permit amendment of the original complaint to add the action under the Anti-trust laws of the United States.

V. THE DECISION OF THE DISTRICT COURT WAS CLEARLY WRONG.

The District Court's decision was based on *Carroll* v. *Warner Bros. Pictures Inc.*, 20 F. Supp. 405 (D.C.S.D. N.Y. 1937). There the plaintiff brought suit in the State Court of New York for slander of title, unjust enrichment and services rendered, defendant being a Delaware corporation doing business in New York. After defendant removed the case to the Federal Court because of diversity of citizenship, plaintiff amended its complaint to add a fourth claim, under the Anti-trust laws of the United States. Judge Leibel, *on his own motion*, dismissed the fourth claim on the ground that the plaintiff in a removed case could not add a claim over which the State Court would not have had jurisdiction in the first instance. He relied on:

> *Lambert Run Coal Co.* v. *B & O Railroad Co.*, 258 U.S. 377 at 382 (1921.)

General Investment Co. v. *Lake Shore & M.S. Railway Co.*, 260 U.S. 261 at 288 (1922).

Other cases to similar effect are:

Venner v. *Michigan Central R.R. Co.*, 271 U.S. 127 at 131 (1925).

Minnesota v. *United States*, 305 U.S. 382 at 388-9 (1938).

He failed to note, however that these were cases in which the plaintiff had brought suit in the State Courts *on Federal causes of action, of whose subject matter the State Court had no jurisdiction in the first place*, and that this Court, by its language, was talking about the original action brought in the State Court, of which that court had no jurisdiction—*not a Federal action added after removal to the Federal Court.*

In the Lambert case, for instance, the plaintiff brought suit to enjoin the railroad from complying with the Rules of the Interstate Commerce Commission regarding distribution of coal cars under the Transportation Act of 1920.

In the General Investment case the plaintiff sued in the State Court to enjoin the consolidation of certain railroad companies on the ground—

> "that it would contravene the Sherman Anti-Trust Act and the Clayton Act—both laws of the United States. There were also charges that it would be contrary to the Constitution and laws of Ohio and other states, but the general tenor of the bill made it evident that these charges were to be taken as of secondary importance" (p. 264).

As to the latter, Mr. Justice Van Devanter said (p. 288):

> "This branch of the suit was loosely set forth and as was observed by both courts below there is some ground

for thinking the references to state constitutions and laws were merely make-weights. With other matters eliminated this branch at best was left in a state of relative uncertainty."

In the Minnesota case the State of Minnesota brought suit in a court of that state to take by condemnation a right of way over land forming part of an Indian Reservation granted by Treaty and Act of Congress.

In the Venner case a minority stockholder sued in the State Court to enjoin the Railroad from carrying out an agreement to acquire equipment and issue certificates therefor, as permitted by an order of the Interstate Commerce Commission.

In each of these cases the State Court was without jurisdiction of the subject matter of the action, entirely or principally, and, of course, lacked jurisdiction to render a valid judgment therein. Although this incipient defect was cured by defendant's removal of the case to the Federal Court, which had jurisdiction of the subject-matter, this Court held that where the State Court lacked jurisdiction of the subject matter or of the parties,* the Federal Court acquired none, although in a like suit originally brought in a Federal Court it would have had jurisdiction.

But that was not the situation in the present case, nor the Carroll case. Here and in the Carroll case, the State Court had jurisdiction of the subject matter of the original causes

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* Cases in which the State Court lacked jurisdiction over the *person* of the defendant are:

Wabash Western Ry. v. *Brow*, 164 U.S. 271 (1896).
Hassler v. *Shaw*, 271 U.S. 195 (1925).
Morris & Co. v. *Skandinavia Insurance Co.*, 279 U.S. 405 (1928).

The lack of jurisdiction over the defendant's person, however, must be taken advantage of by special appearance, or similar plea to the jurisdiction, in the Federal Court.

of action, as well as personal jurisdiction of the defendants. *Here there was full jurisdiction to render a valid judgment in the original action in the State Court,* and the State Court having full jurisdiction, the Federal Court acquired the same jurisdiction on removal, as well as over such other federal causes of action which the plaintiff might have against the defendant, within the language and policy of Rule 18 (a) of the Federal Rules of Civil Procedure—as the Court of Appeals well pointed out herein (R. pp. 73–75). The cases relied on by the District Court are thus clearly distinguishable.

We ask the Court to note specifically that the language of this Court in the three cases relied on by the District Court herein, referred to the original action brought in the State Court, of which the State Court had no jurisdiction as to subject matter. But now the defendant applies that same language to the new claim added by amendment after removal of the case to the Federal Court—a wholly different situation.

The *Carroll* case is criticized in a Note in 51 Harvard Law Review, pp. 927–8 (1938) and in Moore's Federal Practice Sec. 15.01 at pp. 787–8—printed in full respectively, in Appendix A and B to this Brief.

Subsequent to the *Carroll* case, two other District Courts have been misled by Judge Leibell's decision and have failed to note the distinction that in their cases the State Court had jurisdiction of both subject matter and the person of the defendant and hence full power to render a valid judgment. They are:

Noma Electric Corp. v. *Polaroid Corp.*, F. Supp. , 2 Fed. Rules Dec. 454, 54 USPQ 138 (D.C.S.D. N.Y., 1942), wherein the plaintiff brought suit in the State Court of New York to enjoin unfair competition, the defendant Polaroid Corporation being a Delaware corporation doing business in New York. On removal to the Federal Court because of diversity of citizenship, the Polaroid Corporation counter-

claimed for infringement of patent and the District Court dismissed the counterclaim for lack of jurisdiction of the Federal Court.

Here the *defendant*, after removal, sought to *counterclaim* on a federal claim—as permitted by Rule 13 (a, b) of the Federal Rules of Civil Procedure. But even a defendant, we submit, can take advantage of his right of removal to the Federal Court, and the Federal Rules of Civil Procedure thereafter—which permit counterclaims generally—and this right is not in any way limited to those of which the State Court would have had jurisdiction as to subject matter. This is true even though the removal is *intentionally* made to take advantage of the broader scope of counterclaim permitted by Federal Rule. We submit that the situation is governed by *Ex parte Fisk*, 113 U.S. 713 (1884) (*supra* p. 10).

The policy of the Federal Courts, expressed in their Rules of Civil Procedure, should control *all cases* in those Courts, whether brought there originally, or removed thereto, as the Rules intend. The right to counterclaim in a *removed case* should be governed by the Federal Rules of Civil Procedure, exactly as if the case had been brought originally in the Federal Court, on diversity of citizenship, we submit.

In *Howe* v. *Atwood*, 47 F. Supp. 979, 55 USPQ 177, (D.C. E.D., Mich., S.D., 1942) the plaintiff brought suit against the defendants as individuals to recover royalties under a patent license agreement. On removal to the Federal Court for diversity of citizenship, the plaintiff filed an amended bill adding patent infringement, and the District Court held that the plaintiff could not thus enlarge the jurisdiction acquired from the State Court and hence that the defendant could not attack the validity of the patents.

For good reason, therefore, the Court of Appeals herein refused to follow the *Carroll* case and reversed the District Court below, we submit.

VI. IT IS NOT A DENIAL OF DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION FOR A FEDERAL COURT, IN A CASE REMOVED THERETO BECAUSE OF DIVERSITY OF CITIZENSHIP, TO SUBJECT A DEFENDANT, OVER WHOM THE STATE COURT HAS ACQUIRED JURISDICTION, TO A NEW CLAIM OVER WHICH THE FEDERAL COURT HAS EXCLUSIVE JURISDICTION AS TO SUBJECT MATTER, AND WHICH BY ITS RULES MAY BE BROUGHT AGAINST A DEFENDANT.

There can be no question, of course, as to the *procedural* right of the Federal District Court, in a removed case, to subject the defendant over whom the State Court has acquired jurisdiction—to a new claim of which the Federal Court has exclusive jurisdiction as to subject matter—such as the claim added by amendment herein, under the Anti-Trust laws of the United States. As previously pointed out, the Federal statutes and rules expressly provide that the Federal Rules govern all procedure after removal (Rule 81(c)), and by Rule 18 (a) that the plaintiff in the Federal Court may join as many claims as he may have against the defendant. More fundamental, of course, is the question of *jurisdiction*—the *power* of the Federal Court to subject a defendant in this situation to new claims, over which the Federal Court has exclusive jurisdiction, and which could not have been brought in the State Court. This question necessarily involves consideration of due process of law—in this instance under the 5th Amendment of the Constitution—and incidentally, the relation between State and Federal Courts, under our dual system of government.

A. There is, first of all, nothing in the relation between State and Federal Courts which requires us to say that, Constitutionally, State Courts can adjudicate only State or common law claims or rights, and Federal Courts only Fed-

eral claims and rights. Thus it is entirely immaterial that the new claim herein (under the Federal Anti-Trust laws) is one over which the Federal Courts have exclusive jurisdiction as to subject matter, and which could not have been brought in the State Court. Nothing can turn on that fact. In diversity of citizenship cases, the jurisdiction of State and Federal courts is *concurrent*—each court has plenary power to act. In such cases when brought in the Federal Courts, whether originally or removed thereto, the Federal Court, although an independent Court, applies the law of the State to the action.

> *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 at 78 (1937).

There is thus no sharp dividing line as to respective jurisdiction of State and Federal Courts, in cases involving Federal and State (or common law) claims and rights. State Courts, of course, frequently adjudicate Federal claims—a familiar example being those under the Federal Employers Liability Act, *Title 45, U.S.C. Sec. 56.* Moore's Federal Practice, p. 3470; Sec. 101.08, p. 3509. Federal Courts likewise commonly adjudicate State or common law claims—as in diversity cases.

This is also true historically. Originally, of course, under the Judiciary Act of 1789,[1] cases arising under the Constitution, Laws & Treaties of the United States were confided in the first instance to the State Courts—reviewable by the United States Supreme Court only when a claim of Federal right was denied. Except for the short-lived Judiciary Act of 1801,[2] not until the Judiciary Act of 1875[3] were the Federal Courts made general depositories of claims of Federal rights, and even then the jurisdiction was concurrent with the State Courts, by express language—although

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[1] Act of Sept. 24, 1789; 1 Stat. 73.

[2] Act of Feb. 13, 1801; 2 Stat. 89; (repealed in 1802)

[3] Act of March 3, 1875; 18 Stat. 470.

a case started in a State Court could be removed to the Federal Court. But by the Judiciary Act of 1887,[4] the right of removal was restricted to defendants, and the necessary amount in dispute was raised to $2000—and in 1911 to $3000.[5]

It is thus obviously immaterial herein that the State Court lacks jurisdiction to adjudicate claims under the Anti-Trust Laws of the United States. The suit in the State Court did not involve the Federal Anti-Trust Laws. This Court was obviously not referring to a Federal claim added *after removal* in the *Lambert, General Investment* and *Minnesota* cases above referred to. The State Court had jurisdiction, both of subject matter and person in the original action brought therein, which the District Court acquired on removal. But the Federal Court, likewise having full jurisdiction on removal, can also adjudicate claims under the Anti-Trust laws, as it is now asked to do. It is wholly unnecessary, because of the Constitution or the respective distribution of power between State and Federal Courts, to obtain jurisdiction that the plaintiff start over again in the Federal Court in Massachusetts or Ohio with personal service on Freeman—as the District Court insisted it must. The Federal Court now has jurisdiction and full power to act.

Many cases, of course, are brought originally in the Federal courts involving separate grounds of Federal jurisdiction, such as patents, copyrights, Federal trade-mark registration, Federal Anti-Trust laws and the like,—as well as diversity of citizenship. It should, of course, make no difference whatever, in an action removed from a State court

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[4] Act of Mar. 3, 1887; 24 Stat. 552.

[5] Act of March 3, 1911; 36 Stat. 1087. And see:
Frankfurter & Landis, The Business of the Supreme Court, (1928) pp. 64–69;
Frankfurter, "Distribution of Judicial Power Between United States and State Courts"—13 Cornell L.Q. 499 at 507–511 (June, 1928).

because of diversity of citizenship, that other grounds of Federal jurisdiction are added, *after removal,* as in the instant case—as the Federal Rules permit, by amendment and counterclaim. The only exception is when the State Court has no jurisdiction of the subject matter of the suit as brought in the State Court—as in the *Lambert, General Investment,* and *Minnesota* cases, *supra.*

B. *This jurisdiction of the Federal Court to adjudicate a claim under the Federal Anti-Trust laws, added to a common law claim for breach of contract, after removal from a State Court because of diversity of citizenship, is based on the jurisdiction of the Federal Courts over citizens of the United States. The petitioner Freeman is a resident and citizen of Ohio, and hence a citizen of the United States—Constitution, 14th Amendment. A national court, of course, has jurisdiction over its own nationals. By removing the action from the Massachusetts Court (which had jurisdiction over his person by service of process on him while present in the State) the petitioner himself invoked the jurisdiction of the national or Federal Court, and the Federal Court acquired jurisdiction over him as a citizen of the United States, and hence had jurisdiction and power to subject him to new claims (Federal or otherwise) which its Rules of Civil Procedure (here Rule 18a) permit to be brought against one properly within its jurisdiction.*

Restatement, Judgments, thus states the rule:

"Sec. 17. CITIZENSHIP.

A court of the United States may acquire jurisdiction over a citizen of the United States although he is not domiciled within the United States.

Comment:

a. *Citizenship as a basis of jurisdiction.* By the Fourteenth Amendment to the Constitution of the United States it is provided that 'All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' A person born or naturalized in the United States is a citizen of the United States although he is domiciled in a foreign country. The United States has jurisdiction over its citizens although they are not present and are not domiciled in the United States. The allegiance owed by a citizen to the nation is a basis of jurisdiction. The Congress, therefore, may confer jurisdiction upon the courts of the United States over absent citizens. (See Restatement of Conflict of Laws, Sec. 80, Comment c.)"

A fortiori, of course, when the citizen is still domiciled within the United States.

Restatement, Judgments, further states (Sec. 5, Comment b).

"b. Judgments rendered by federal courts. The Federal Rules of Civil Procedure provide in Rule 4 (f) that 'All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state.' *The Congress could constitutionally provide that in actions brought in the federal courts service of process might be made anywhere within the United States, since the United States has jurisdiction over all persons anywhere within the United States; and although an action is brought in a federal district court in a particular State, the Congress could provide for personal service upon the defendant in another State.* The inconvenience to defendants which would result is a sufficient reason for the failure of the Congress ordinarily to permit the exercise of jurisdiction in such a manner, *although there is no constitutional objection to such exercise of jurisdiction.* In certain cases, indeed, the Congress even in proceedings in personam has permitted service

> of process outside the territorial limits of the State in which the district court is held."

And see:

Restatement, Conflict of Laws, Sec. 80.

The jurisdiction of the Federal Courts over the petitioner, who removed this action thereto, is therefore beyond question. And here the Federal Court in Massachusetts also had venue of the action (Title 28 USC, Sec. 112; *supra* p. 8), but even if it had not, it is now well settled when a defendant removes an action to the Federal Court because of diversity of citizenship, that he thereby waives all objection to venue or locality of the suit.

In *In re Moore*, 209 U.S. 490 (1907), Mr. Justice Brewer said (p. 496):

> "That the defendant consented to accept the jurisdiction of the United States court is obvious. It filed a petition for removal from the State to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had."

And see page 506.

See also:

Lee v. *Chesapeake & Ohio Ry. Co.*, 260 U.S. 653 (1922).

Kreigh v. *Westinghouse, Church, Kerr & Co.*, 214 U.S. 249 at 252–3 (1908).

Western Loan & Savings Co. v. *Butte & Boston Mining Co.*, 210 U.S. 368 at 369 (1907).

Commercial Casualty Ins. Co. v. *Consol. Stone Co.*, 278 U.S. 177 at 179 (1928) and cases cited therein.

Philadelphia & Reading Coal & Iron Co. v. *Keslusky* 209 F. 197 at 199 (C.C.A. 2, 1913).

Memphis Savings Bank v. *Houchens*, 115 F. 96 at 101–102 (C.C.A. 8, 1902).

As Mr. Justice Frankfurter said in *Neirbo Co.* v. *Bethlehem Ship Building Corp.*, 308 U.S. 165 (1939) in an analogous situation (pp. 167–8):

"The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. After a period of confusing deviation it was firmly re-established in *General Invest. Co.* v. *Lake Shore & M. S. R. Co.*, 260 U.S. 261, and *Lee* v. *Chesapeake & O. R. Co.*, 260 U.S. 653, overruling *Ex parte Wisner*, 203 U.S. 449, and qualifying *Re Moore*, 209 U.S. 490. All the parties may be non-residents of the district where suit is brought. *Lee* v. *Chesapeake & O. R. Co., supra.* Section 51 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' *Commercial Casualty Ins. Co.* v. *Consolidated Stone Co.*, 278 U.S. 177, 179.

Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Commercial Casualty Ins. Co.* v. *Consolidated Stone Co., supra.* Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind Sec. 51, which is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found'. *General Invest. Co.* v. *Lake Shore & M. S. R. Co., supra* (260 U.S. at 275)."

C. Furthermore, by removing the case to the Federal Court, and conduct constituting a general appearance therein, defendant further submitted himself to the jurisdiction of the Federal Court for all purposes, as if he applied as plaintiff to that court to hear his dispute, and hence that court acquired jurisdiction and power over the defendant to subject him to such new claims are are within the jurisdiction and competence of the Federal Court and permitted under its rules to be brought against such a defendant. Jurisdiction over the defendant's person to adjudicate added claims against him was thus additionally acquired by consent.

The Federal Courts, of course, in diversity of citizenship cases have a jurisdiction concurrent with that of the State Court, whether the case is brought therein orginally or removed thereto from a State Court. Historically, of course, jurisdiction of the Federal Courts in diversity of citizenship cases was conferred under the Constitution (Art. 3, Sec. 2) to prevent apprehended discrimination in state courts against those not citizens of the State.

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 at 74 (1937).

Bank of the United States v. *Deveaux*, 5 Cranch 61 at 87 (U.S. 1809).

Gordon v. *Longest*, 16 Peters 97 at 104 (1842).

Friendly, Historic Basis of Diversity Jurisdiction, 41 Harvard Law Rev. 483 (1928).

Frankfurter, Distribution of Judicial Power Between United States & State Courts, 13 Cornell L.Q. 499 at 520–523 (1928).

A defendant in a suit in a State Court involving diversity of citizenship is thus given the right of removing it to the Federal Court—Title 28 U.S.C. Sec. 71. *He has the right to select the forum, State or Federal, which shall hear his*

dispute. There is no compulsion on defendant to remove the case. Removal is wholly his voluntary act. But by so doing he becomes the actor and thus invokes the jurisdiction of the Federal Courts to hear his cause, and, when he enters a general appearance, he clearly submits his person to the jurisdiction of the Federal Court for all purposes, just as if he applied to that Court, as a plaintiff, to hear his dispute. Hence he subjects himself to new claims permitted under Federal Statutes and Rules to be brought against an opposing party over whom jurisdiction has been properly obtained. This is in accord with the settled rules of jurisprudence, and the decisions of this Court. The general rule is thus stated in *Restatement, Judgments, Secs.* 18, 19:

> "*Sec. 18.* Consent.
>
> A court may acquire jurisdiction over an individual if he consents to the exercise of jurisdiction over him."
>
> "*Sec. 19.* General Appearance.
>
> A court may acquire jurisdiction over an individual by his general appearance in the action."

See also:

> *Restatement, Conflict of Laws, Secs.* 81, 82.

The *Restatement, Conflict of Laws, Sec.* 82 expressly states in Comment d, page 126:

> "d. *Subsequent amendments to complaint after appearance.* When by the law of the state in which the action is brought, an appearance is such as to subject him to the jurisdiction of the court generally, jurisdiction attaches not only with respect to claims stated in the original complaint but also to the claims by the same plaintiff stated in amendments to the complaint if the law of the state where the action is brought so provides at the time of the appearance.

Illustration:

1. A brings an action against B in a court of state X alleging that B beat A. B enters an appearance in the action. By the law of X, at the time such an appearance subjects the defendant to all claims of the plaintiff which may be added by amendment. Subsequently A amends his complaint by adding a count in slander. The court has jurisdiction to render a judgment against B for the slander."

In *Lanasa* v. *Beggs*, 159 Md. 311, 151 Atl. 21 (1930), in an analogous situation, Judge Parke said (159 Md. at 314):

"The present purpose of an attachment against a nonresident tort-feasor is to compel his appearance to an ordinary action at law, and to secure meanwhile a specific lien on his property attached until a good and sufficient bond is substituted. Code, art. 9, sec. 19. *If, instead of suffering the attachment proceedings to take their course, such nonresident wrongdoer take the other alternative and elect to appear to the action, he must be held bound by the principles and rules of pleading and practice which prevail in the court to whose jurisdiction he has voluntarily submitted, since his appearance is by choice,* and an action for wrongs independent of contract against a nonresident does not differ in substance and procedure from an action against any other defendant in a suit *in personam* within the general jurisdiction of the court. So, the nonresident defendant may plead any available defense and he is bound by the law and procedure of the forum in the conduct of the case, unaffected by the fact that an attachment was issued or is outstanding.

Accord:

Turner v. *Jarboe,* 145 Kan. 202 at 209, 64 Pac. 2d 26 (1937).

In *DeLima* v. *Bidwell,* 182 U.S. 1 (1900), Mr. Justice Brown said, (p. 174):

> "1. Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the Circuit Court as a Federal court, we should be obliged to say that the defendant was not in a position to make this claim since the case was removed to the Federal Court upon his own petition. *It is no infringement upon the ancient maxim of the law that consent cannot confer jurisdiction, to hold that, where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a Federal court, he is estopped to deny that such removal was lawful, if the Federal court could take jurisdiction of the case, or that the Federal court did not have the same right to pass upon the questions at issue that the state court would have had if, the cause had remained there.* Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place. *Cowley* v. *Northern Pacific Railroad Co.,* 159 U.S. 569, 583; *Mansfield Railway Co.* v. *Swan.* 111 U.S. 379; *Mexican Nat. Railroad* v. *Davidson,* 157 U.S. 201."

In *Cowley* v. *Northern Pacific Railroad Co.,* 159 U.S. 569 (1895), Mr. Justice Brown said (p. 583):

> "The case having been removed to the Circuit Court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, *unless the court from which it was removed had no jurisdiction.*"

In *Spencer* v. *Duplan Silk Co.*, 191 U.S. 526 (1903), Chief Justice Fuller said (pp. 531–2):

> "Plaintiff brought his action in the state court, and its removal on the ground of diverse citizenship placed it in the circuit court as if it had been commenced there on that ground of jurisdiction, . . ."

D. *The same rule of jurisdiction obtained by consent is illustrated by the jurisdiction obtained over a plaintiff as to counterclaim and cross actions which may be brought against him under the law of the State. Restatement, Judgments* Sec. 21 thus states the rule:

Sec. 21. JURISDICTION OVER PLAINTIFF:

> "An individual who brings an action is subject to the jurisdiction of the court as to the cause of action, and, if the law of the State so provides at the time of the beginning of the action, as to any cause of action against him by the defendant which the defendant may rely upon as a counterclaim or independent cross-action."

To similar effect is *Restatement, Conflict of Laws*, Sec. 83. Cases applying this principle are numerous.

In *Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U.S. 286 (1906) a suit based on diversity of citizenship, where defendant counterclaimed and then objected to the jurisdiction of the court over its person, Mr. Justice Holmes said (pp. 289-290):

> "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. . . . *But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiciton of the court in the same action and by invoking submitted to it. . . . This single fact shows*

> ***that the defendant if, he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences.*** The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense. . . .
>
> There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. *DeLima* v. *Bidwell,* 182 U.S. 1, 174; *Fisher* v. *Shropshire,* 147 U.S. 133, 145; *Farmer* v. *National Life Association,* 138 N.Y. 265, 270."

Hence by removing his case, thus selecting his forum and entering a general appearance, the petitioner here invoked the jurisdiction of the Federal court, and by invoking, submitted to it. By so doing he assumed the position of an actor, and must take the consequences, that plaintiff may amend his complaint to add a Federal claim, under Rule 18(a).

In *Adam* v. *Saenger,* 303 U.S. 59, Mr. Justice Stone said (pp. 67–68):

> "There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its court

to the plaintiff. *Frank L. Young Co.* v. *McNeal-Edwards Co.* 283 U.S. 398, 400, 75 L. ed. 1140, 1141, 51 S. Ct. 538; compare *Chicago & N. W. R. Co.* v. *Lindell*, 281 U.S. 14, 17, 74 L. ed. 670–672, 50 S. Ct. 200."

In *Fisher* v. *Shropshire*, 147 U.S. 133 (1892), Mr. Justice Fuller said (p. 145):

> *"The suit was removed into the Circuit Court of the United States by the defendant John Lyle, and having done that, he then contended that the court had no jurisdiction, because George Lyle was an indispensable party defendant, and he was a citizen of the same State as complainants. We do not think this will do.* If George Lyle, who was fully aware of the pendency of the suit and gave his testimony therein, desired to set up equities which he claimed arose from the payment of part of the purchase price of the property before the suit was brought he might, as pointed out by the Circuit Court, have intervened in the cause, for the protection of his rights, without ousting the jurisdiction. *This he did not do, and we are not prepared to hold the Circuit Court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it."*

In *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1931), the plaintiff, a non-resident, brought a patent infringement suit against the defendant in the District Court of Massachusetts. The defendant counterclaimed for infringement of another patent. The plaintiff's suit was dismissed and the defendant recovered on its counterclaim and subsequently brought a contempt proceeding. The plaintiff objected that the court had acquired no personal jurisdiction over it in Massachusetts. Mr. Justice Hughes said (p. 451):

"First. The question of jurisdiction turns upon the nature and effect of the decree in the infringement suit and the relation to that suit of the contempt proceeding. When the respondent brought the suit in the Federal District Court for the District of Massachusetts, it submitted itself to the jurisdiction of the court with respect to all the issues embraced in the suit, including those pertaining to the counterclaim of the defendants, petitioners here. Equity Rule 30. See Langdell, Eq. Pl. Chap. 5, Sec. 119; *Frank L. Young Co.* v. *McNeal-Edwards Co.*, 283 U.S. 398, 400, 75 L. ed. 1140, 1141, 51 S. Ct. 538."

In *Frank L. Young Co.* v. *McNeal-Edwards Co.*, 283 U.S. 398, Mr. Justice Holmes said in a case arising under the Conformity Act (pp. 400–401):

"Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law. *Arkwright Mills* v. *Aultman & T. Machinery Co.* (C.C.) 128 Fed. 195, 196. Mr. Langdell observes that there is no necessity for such ceremony in the nature of things 'for, the plaintiff being already in court qua plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence'. Langdell, Eq. Pl. chap. 5, Sec. 119. The characterization of the contrary doctrine as pernicious by Mr. Justice Miller in *Partridge* v. *Phoenix Mut. L. Ins. Co.*, 15 Wall. 573, 21 L. ed. 229, is repeated in *Chicago & N. W. R. Co.* v. *Lindell*, 281 U.S. 14, 17, 74 L. ed. 670, 672, 50 S. Ct. 200. We see no reason to doubt the constitutionality of the present application of the state law. The policy of it is embodied in equity rule 30. See *Aldrich* v. *E. W. Blatchford & Co.*, 175 Mass. 369, 56 N.E. 700.

> The case is within the jurisdiction of the district court in all other respects if the respondent has been served with process effectively. We are of opinion that the service was good and that the case should not have been dismissed."

In *Chicago & Northwestern Railway Co.* v. *Lindell,* 281 U. S. 14 (1929) Mr. Justice Butler said (p. 17:

> "The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the court's time and injustice. . . . *Partridge* v. *Phoenix Mut. L. Ins. Co.,* 15 Wall. 573, 579, 21 L. ed. 229, 230. In the case last mentioned the court, speaking through Mr. Justice Miller, said (p. 580): 'It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal setoffs and counterclaims to be interposed and tried in the same suit and in the same form."

See also:

General Electric Co. v. *Marvel Rare Metals Co.* 287 U.S. 430 at 435 (1932).

Alexander v. *Hillman,* 296 U.S. 222 at 238, 240–1 (1935).

American Mills Co. v. *American Surety Co.,* 260 U.S. 360 at 366 (1922).

Beale, Conflict of Laws, Sec. 83.

By acting voluntarily and affirmatively in removing the case to the Federal Court and thus selecting his forum, the

defendant becomes the actor, invokes the jurisdiction of the Federal Court to adjudicate his cause, and cannot now be heard to say that the Federal Court lacks jurisdiction to hear an additional claim arising out of the same transaction and expressly permitted to be brought against the defendant under its rules of procedure, Rule 18(a).

We thus have ample grounds of jurisdiction for the Federal Court to render a valid judgment herein in the added claim under the Federal Anti-Trust laws. As well summarized in the *Restatement, Conflict of Laws,* (Sec. 77):

> "Sec. 77. Bases of Jurisdiction.
>
> (1) The exercise of jurisdiction by a state through its courts over an individual may be based upon any of the following circumstances:
>
> (a) the individual is personally present within the state,
>
> (b) he has his domicile within the state,
>
> (c) he is a citizen or subject owing allegiance to the nation,
>
> (d) he has consented to the exercise of jurisdiction,
>
> (e) he has by acts done by him within the state subjected himself to its jurisdiction."

The Massachusetts Court had jurisdiction over the original claim and the person of the defendant on the ground (a) This was transferred to the Federal Court on the removal. But by the act of removal and general appearance thereafter, the Federal Court also gained jurisdiction over the defendant on grounds (c) and (d), as well. The jurisdiction of the Federal Court herein to render a valid judgment in the Federal Anti-Trust suit is therefore unassailable, we submit.

E. This case is not one, therefore, where it may be said that the only ground for jurisdiction is personal service upon the defendant while temporarily within Massachusetts,

and that the defendant, appearing specially, has submitted himself to the jurisdiction of the Court only for the purpose of the original claim, but not for additional claims. Here the Federal Court as a national court, invoked by the defendant himself, has jurisdiction over its own nationals, and the power to subject them to its own rules. Furthermore, by his voluntary, affirmative act of removing his case and asking the Federal Court to hear the cause, the defendant has become the actor and has invoked its jurisdiction and has submitted himself to it, and hence is properly subject to any other claim which may be brought against him as provided by the laws and rules of the Federal Court in effect at the time of the removal. He has thus additionally conferred jurisdiction on the Federal Court over his person by consent.

Clearly distinguishable, therefore, are cases like:

Ex parte Indiana Transportation Co., 244 U.S. 456 (1916) where appearance upon a libel *in personam* was held not to empower the Court to allow additional claimants to intervene without new service on the defendant. The case can be treated precisely as if it were an appearance by unauthorized attorney as to the additional claimants, (Restatement, Conflict of Law, Sec. 83, Comment e.).

New York Life Ins. Co. v. *Dunlevy*, 241 U.S. 518 (1915), where the respondent was not a citizen of Pennsylvania at the time of the interpleader proceedings and had not submitted voluntarily to the jurisdiction of the Pennsylvania Court by affirmative act, as in the instant case.

F. It is likewise obviously immaterial that under the law of Massachusetts applicable to actions in the State Courts, actions of contract and of tort cannot be joined. In the Federal Courts, the Federal Rules of Civil Procedure expressly apply to all suits of a civil nature therein, unless

expressly excepted—Rules 1 and 81, and particularly Rule 81(c). The Federal Rules, of course, have the force and effect of statute—Title 28 USC, Secs. 723 b and c. The Conformity Act, Title 28 USC, Sec. 724 has been expressly repealed and superseded by the Federal Rules of Civil Procedure. No one, of course, doubts Federal power over procedure in the Federal Courts. As Mr. Justice Reed said in *Erie RR. Co.* v. *Tompkins*, 304 U.S. 64 at 92:

> "The line between procedural and substantive law is hazy but no one doubts federal power over procedure. *Wayman* v. *Southard*, 10 Wheat. 1. 6 L. ed. 253. The Judiciary Article and the 'necessary and proper' clause of Article One may fully authorize legislation, such as this section of the Judiciary Act."

And see:

Wayman v. *Southard*, 10 Wheat. 1 at 21–22, 24–26 (1825).

Ex parte Fisk, 113 U.S. 713 at 724–726 (1884).

Northern Pacific R. Co. v. *Paine*, 119 U.S. 561 at 563 5 (1886).

Hurt v. *Hollingsworth*, 100 U.S. 100 at 103–4 (1880).

To what extent State procedure and remedies are applicable in the Federal Courts now depends, of course, on the express provisions of the Federal Rules of Civil Procedure —as, for instance, in Rules 43, and 64, relating to evidence, attachment, garnishment and the like. Likewise to understand the decisions, we must bear in mind the Federal Statutes regulating procedure in the Federal Courts at the particular time—such as the Conformity Act. Thus, *East Tennessee Va. & Ga. R. Co.* v. *Southern Telegraph Co.*, 112 U.S. 306 (1884) (Petitioner's Brief, pp. 16–17) involved a statutory proceeding under the Rule of Decision Act. *Rorick* v. *Devon Syndicate Ltd.*, 307 U.S. 299 (1938) is also dis-

tinguishable. It arose before the effective date of the Federal Rules of Civil Procedure (Sept. 16, 1938) and was governed by the Federal attachment statute then in effect—Title 28 U.S.C. Sec. 726—and would now be governed by Rule 64 of the Federal Rules of Civil Procedure.

Neither is the situation affected by the rule of *Erie RR. Co.* v. *Tompkins,* 304 U.S. 64 (1937). There is no thought that in such a case, in the Federal Courts because of diversity of citizenship, that State procedure will apply, except as expressly provided in the Federal Rules of Civil Procedure. Furthermore, *Erie RR. Co.* v. *Tompkins,* after all, merely construes the Rule of Decision Act, Title 28 U.S.C. Sec. 725, and this Court's construction of it is expressly incorporated into the Rules of Civil Procedure. See Rule 81(e) and Note of the Advisory Committee.

G. Petitioner's quarrel with the policy of Congress in permitting a suit under the Anti-Trust Laws of the United States to be brought against the defendant where "he is found" (Title 15, U.S. Sec. 15)—that it "completely disregards the hardship on the defendant"—is misdirected, and overlooks the equal hardship on the plaintiff if compelled to sue only in the district of defendant's residence. Congress obviously weighed the competing interests of the parties and the public in specifying the district of suit.

VII. CONCLUSION.

There can thus be no question that the Federal Court here has jurisdiction and power to subject the petitioner, who removed his case thereto, to a new or Federal claim permitted to be brought against him under its Rules. In thus invoking its jurisdiction, he subjected himself to its rules. The petitioner here, of course, cannot invoke the jurisdiction of the Federal Courts for purposes which suit his convenience and deny it for those that do not. Hence

it was no "subterfuge" for respondent to amend its complaint after removal to add an action under the Anti-Trust laws of the United States—as expressly permitted by the Federal Rules of Civil Procedure—nor does it constitute a denial of due process of law under the 5th Amendment of the Federal Constitution for the Federal Court to permit respondent to do so.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Boston, Mass., April 24, 1943.

APPENDIX A.

Note in 51 Harvard Law Review 927–928 (1938), re Carroll v. Warner Bros. Pictures, 20 F. Supp. 405.

Federal Courts—Removal Jurisdiction—Amendment to the Complaint After Removal to Include Cause of Action Within Exclusive Federal Jurisdiction—In an action brought in a New York court, the plaintiff alleged that, at the defendant's request, he had submitted a scenario to the defendant motion picture producer; that the defendant had rejected the script, but later had registered the plot with a motion picture producers' association; that by the rules of the association, registration of a motion picture subject gave the defendant exclusive rights; and that other producers, in conformity with the practice of their association, had refused to purchase the plaintiff's scenario. The complaint included three separate counts for slander of title, unjust enrichment, and for services rendered. The defendant removed the case to the federal district court, and the plaintiff thereafter amended his complaint to include a fourth count alleging an unlawful combination in restraint of trade. The defendant moved to dismiss the complaint for failure to state a cause of action. Held, that although the second and third counts stated causes of action, the fourth count, based upon violation of the federal antitrust laws, must be dismissed for lack of jurisdiction over the subject matter. Fourth count dismissed. *Carroll* v. *Warner Bros. Pictures,* 20 F. Supp. 405 (S.D.N.Y. 1937).

The federal courts alone have jurisdiction in cases arising under the federal anti-trust laws. 38 Stat. 731 (1914) 15 U.S.C. Sec. 15 (1934); see *Blumenstock Bros. Advtg. Agency* v. *Curtis Publishing Co.,* 252 U.S. 436, 440 (1920). When such an action is brought in a state court, therefore, and subsequently removed, it is held that jurisdiction over the action is not acquired by the removal to the federal court

and that the action must be dismissed, even though the court would have taken cognizance of a similar case brought before it originally. *General Investment Co.* v. *Lake Shore & Mich. So. Ry.*, 260 U.S. 261, 286 (1922). This result is best explained on the ground that, because of lack of jurisdiction, no cause was in fact pending before the state court, and that therefore none was removed to the federal court. See *Fidelity Trust Co.* v. *Gill Car Co.*, 25 Fed. 737 (S.D. Ohio 1885). *Where the state court has jurisdiction over the parties and the subject matter, however, this rationale fails, even if the complaint were demurrable for failure to state a cause of action. To allow the plaintiff, after removal, to amend his complaint to set forth a violation of the antitrust laws would not seem to do violence to the removal statutes, which provide that the district court shall proceed "as if the suits had been originally commenced in the said district court".* 18 Stat. 472 (1875) 28 USC Sec. 81 (1934). Moreover, if the plaintiff had pleaded the facts necessary for a cause of action under the anti-trust laws, it is arguable that his theory of action is immaterial and that he should be allowed to proceed even without amendment. *Cf. McAllister* v. *Sloan*, 81 F. (2d) 707 (CCA 8th, 1936). Since the original complaint contained no demand for treble damages, however, such a holding would seem unduly severe on the defendant. Nevertheless, the plaintiff does not seem injured by the court's holding, *so long as the defendant is still available for service*, beyond the inconvenience of instituting a separate action. The dismissal of the antitrust count for lack of jurisdiction of the subject matter does not make that cause of action *res judicata*, and the mere pendency of the suit for unjust enrichment would probably not be held to prevent a second suit on the other theory. *However, since a separate action brought in the district court might properly be consolidated with the removed case, the court seems to reach an unnecessarily technical result by its denial of jurisdiction.* 3 Stat. 21 (1813) 28 USC Sec. 734 (1934).

APPENDIX B.

Moore's Federal Practice Under the New Federal Rules.

Sec. 15.01 (pp. 787–8):

The only qualification to the Rule is that federal jurisdiction be neither enlarged nor restricted. This matter is well illustrated by the recent case, *Carroll* v. *Warner Bros. Pictures.*[11] This case was commenced in a New York state court; the complaint included three separate counts for slander of title, unjust enrichment, and for services rendered. The plaintiffs alleged that, at the request of the defendant motion picture producer, they had submitted a scenario to it; that the defendant rejected the scenario, but later registered the plot with a motion picture producers' association, and because of this registration other producers had, pursuant to the practice of their association, refused to purchase the plaintiffs' scenario. The action was removed to the federal court, and there the plaintiffs amended their complaint to include a fourth count, which charged a combination or conspiracy in restraint of trade in violation of the federal anti-trust laws. The federal court dismissed the fourth count on its own motion on the theory that as the action was a removed one its jurisdiction was derivative;[12] that the New York court would not have had jurisdiction of the fourth count, and hence the federal

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[11] (S.D.N.Y. 1937) 20 F. Supp. 405, noted in (1938) 51 Harv. L. Rev. 927.

[12] In *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.* (1922) 258 U.S. 377, 382, 42 S. Ct. 349, 351, 66 L. Ed. 672, 675, Justice Brandeis wrote: "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the Federal court acquires none, although it might in a like suit orginally brought there have had jurisdiction.

court lacked jurisdiction. The theory of the case that an amendment cannot enlarge jurisdiction is eminently sound. Its application, however, is subject to criticism. Had the fourth count appeared in the complaint filed in the state court, dismissal of that count for lack of jurisdiction, after removal, would have followed the doctrine of the *General Investment Co.* v. *Lake Shore & M. S. Ry.*[13] case. This case established the proposition that if an action is commenced in a state court, over which that court does not have jurisdiction, and is subsequently removed into the federal court, the action must be dismissed, even though the federal court would have taken jurisdiction of a similar case brought before it originally.[14] But it is doubtful if the doctrine of the *General Investment Co.* case applied to the instant case. The New York court did not have jurisdiction of the action as brought; the federal court acquired jurisdiction of the action on removal; and hence it would seem that the federal court had jurisdiction to permit an amendment, which sets

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[13] (1922) 260 U.S. 261, 288, 43 S. Ct. 106, 117, 67 L. Ed. 244, 260: "When a cause is removed from a state court into a federal court, the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated. *Cain* v. *Commercial Publishing Co.*, 232 U.S. 124, 131, 34 S. Ct. 284, 58 L. Ed. 534, 537; *Cowley* v. *Northern Pacific R. Co.*, 159 U.S. 569, 583, 16 S. Ct. 127, 40 L. Ed. 263, 267; *DeLima* v. *Bidwell*, 182 U.S. 1, 174, 21 S. Ct. 743, 45 L. Ed. 1041; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S. Ct. 349, 66 L. Ed. 671."

[14] *Ibid.* This result can be explained on the ground that, because of lack of jurisdiction, no action was in effect pending in the state court, and therefore the federal court could not validly obtain jurisdiction on removal. *Fidelity Trust Co.* v. *Gill Car Co.*, (S.D. Ohio 1885) 25 Fed. 737.

up a claim within its jurisdiction.[15] The holding of the instant case compels the plaintiff to institute a separate action for violation of the anti-trust laws. But if this is done, and the action is brought in the federal district court where the removed action is pending the court may consolidate it with the removed action pursuant to Rule 42. Since federal jurisdiction will not be enlarged by the amendment, practical considerations justify amendment in situations of this kind.

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[15] One of the sections of the general removal statute, 28 U.S.C. Sec. 81, provides that the district court shall provide "as if the suit had been originally commenced in the said district court."

SUPREME COURT OF THE UNITED STATES.

No. 707.—October Term, 1942.

Benjamin W. Freeman, Petitioner, *vs.* Bee Machine Company, Inc. } On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[June 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

It was held in *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377, 382, that where a state court lacks jurisdiction of the subject matter or of the parties, the federal District Court acquires none on a removal of the case. And see *General Inv. Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 288; *Venner* v. *Michigan Central R. Co.*, 271 U. S. 127, 131; *Minnesota* v. *United States*, 305 U. S. 382, 389. That is true even where the federal court would have jurisdiction if the suit were brought there. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co., supra.* As stated by Mr. Justice Brandeis in that case, "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction." 258 U. S. p. 382. The question in this case is whether the rule of those decisions is applicable to a situation involving the following facts:

Petitioner is a resident of Ohio; respondent is a Massachusetts corporation. Respondent brought an action at law against petitioner in the Superior Court of Massachusetts for breach of a contract. Petitioner was personally served when he happened to be in Boston. Petitioner appeared specially and caused the action to be removed to the federal District Court in Massachusetts, petitioner being a non-resident of Massachusetts and there being diversity of citizenship and the requisite jurisdictional amount. Judicial Code § 28, 28 U. S. C. § 71. Petitioner thereupon entered a general appearance[1] — he answered, interposing several defenses including *res judicata;* he also filed a counterclaim. He then moved for a summary judgment. Shortly before

[1] See Western Loan & S. Co. v. Butte & B. Mining Co., 210 U. S. 368, 372; American Surety Co. v. Baldwin, 287 U. S. 156, 165.

that motion came on to be heard respondent moved to amend its declaration by adding a complaint for treble damages under § 4 of the Clayton Act.[2] 38 Stat. 731, 15 U. S. C. § 15. The District Court granted petitioner's motion for summary judgment. 41 F. Supp. 461. But it denied respondent's motion to amend, being of the view that it had no jurisdiction to allow the amendment. 42 F. Supp. 938. In reaching that result the District Court expressed doubts that the venue requirements of § 4 of the Clayton Act were satisfied. But it expressly declined to rest on that basis and placed its decision solely on the *Lambert Co.* line of cases. On appeal the Circuit Court of Appeals sustained the ruling of the District Court on the motion for summary judgment but disagreed with its view on the motion to amend. 131 F. 2d 190. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and the contrariety of views which had developed concerning it.[3]

The *Lambert Co.* case and those which preceded[4] and followed it merely held that defects in the jurisdiction of the state court either as respects the subject matter or the parties[5] were not cured by removal but could thereafter be challenged in the federal court. We see no reason in precedent or policy for extending that rule so as to bar amendments to the complaint, otherwise proper, merely because they could not have been made if the action had remained in the state court.[6] If the federal court has jurisdiction of the removed cause and if the amendment to the complaint could have been made had the suit originated in the federal court, the fact that the federal court acquired jurisdiction by removal does not deprive it of power

[2] That section provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." That section derived from § 7 of the Sherman Act. See Eastman Kodak Co. *v.* Southern Photo Materials Co., 273 U. S. 359, 371-374.

[3] See Noma Electric Corp. *v.* Polaroid Corp., 2 F. R. D. 454; Carroll *v.* Warner Bros. Pictures, Inc., 20 F. Supp. 405; Howe *v.* Atwood, 47 F. Supp. 979, 984. Cf. Newberry *v.* Central of Georgia Ry. Co., 276 Fed. 337, 338.

[4] See Goldey *v.* Morning News, 156 U. S. 518; De Lima *v.* Bidwell, 182 U. S. 1, 174; Courtney *v.* Pradt, 196 U. S. 89, 92; American Well Works Co. *v.* Layne & Bowler Co., 241 U. S. 257, 258.

[5] Wabash Western Ry. *v.* Brow, 164 U. S. 271; Hassler, Inc. *v.* Shaw, 271 U. S. 195; Employers Reinsurance Corp. *v.* Bryant, 299 U. S. 374.

[6] It is clear that the Massachusetts state court did not have jurisdiction over the cause of action under the Anti Trust laws. See 15 U. S. C. § 15, *supra*, note 2; Blumenstock Bros. *v.* Curtis Pub. Co., 252 U. S. 436, 440.

to allow the amendment. Though this suit as instituted involved only questions of local law, it could have been brought in the federal court by reason of diversity of citizenship.[7] The rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, is, of course, applicable to diversity causes removed to the federal courts as well as to such actions originating there. But if the federal court has jurisdiction of the removed cause (*Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201), the action is not more closely contained than the one which originates in the federal court. The jurisdiction exercised on removal is original not appellate. *Virginia* v. *Rives*, 100 U. S. 313, 320. The forms and modes of proceeding are governed by federal law. *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Hurt* v. *Hollingsworth*, 100 U. S. 100; *West* v. *Smith*, 101 U. S. 263; *King* v. *Worthington*, 104 U. S. 44; *Ex parte Fisk*, 113 U. S. 713; *Northern Pacific R.* v. *Paine*, 119 U. S. 561; *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684; *Rorick* v. *Devon Syndicate, Ltd.*, 307 U. S. 299. Congress has indeed provided that in a suit which has been removed the District Court shall "proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal." Judicial Code § 38, 28 U. S. C. § 81. While that section does not cure jurisdictional defects present in the state court action, it preserves to the federal District Courts the full arsenal of authority with which they have been endowed. Included in that authority is the power to permit a recasting of pleadings or amendments to complaints in accordance with the federal rules. *West* v. *Smith*, *supra*; *Twist* v. *Prairie Oil & Gas Co.*, *supra*, p. 687.

It is said, however, that the amendment in question may not be made since the cause of action authorized by § 4 of the Clayton Act may be brought only in a District Court in the district "in which the defendant resides or is found or has an agent." 15 U. S. C. § 15. That requirement relates to venue. But venue in-

[7] Suits based on diversity of citizenship may be brought "only in the district of the residence of either the plaintiff or the defendant." Judicial Code § 51, 28 U. S. C. § 112. Congress has not made the same requirement on removal. Thus an action between citizens of different states begun in a court of a state of which neither is a citizen may be removed to the federal court of the district in which the suit is pending. Lee v. Chesapeake & Ohio Ry Co., 260 U. S. 653. See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 168. Indeed, the defendant must be a non-resident of the state in which suit is brought before he can remove to the federal court on the ground of diversity of citizenship. Patch v. Wabash R. Co., 207 U. S. 277.

volves no more and no less than a personal privilege which "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168. On the face of the present record it would seem that any objection to venue has been waived. There is no indication in the record before us that any such objection was "seasonably asserted." *Commercial Ins. Co.* v. *Consolidated Stone Co.*, 278 U. S. 177, 179; *Interior Construction Co. v. Gibney*, 160 U. S. 217. As we have noted, the District Court did not place its ruling on the grounds of venue. Nor is there any indication in the record that petitioner raised the venue point in the District Court. But even if we assume that he did, it is not clear that the objection has been preserved here.[8]

But we need not rest on that narrow ground. Petitioner was personally served in the state court action. After the removal of the cause he entered a general appearance and defended on the merits. He also filed a counterclaim in the action. He thus invoked the jurisdiction of the federal court and submitted to it. *Merchants Heat & L. Co.* v. *Clow & Sons*, 204 U. S. 286. He was accordingly "found" in the district so as to give the District Court power to allow the complaint in that suit to be amended by adding a cause of action under § 4 of the Clayton Act. This venue provision was designed, as stated by Judge Learned Hand in *Thornburn* v. *Gates*, 225 Fed. 613, 615 "to remove the existing limitations upon the venue of actions between diverse citizens[9] and to permit the plaintiff to sue the defendant wherever he could catch him." But "found" in the venue sense does not necessarily mean physical presence. We noted in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, *supra*, pp. 170-171, that a corporation may be "found" in a particular district for venue purposes merely because it had consented to be sued there. The fact that it was present "only in a metaphorical sense" (308 U. S. p. 170) was not deemed significant. In the present case it is not

[8] The "only question" presented by the petition for writ of certiorari was "whether a plaintiff may amend his complaint in a removed action so as to state a new and independent cause of action against the defendant which would be outside the State Court's jurisdiction." That obviously is not a presentation of a question of venue of a federal district court under § 4 of the Clayton Act; and it can hardly be expanded into one by an incidental discussion of venue in the brief.

[9] See note 7, *supra*.

important that at the time of this amendment petitioner had returned to Ohio and was not physically present in Massachusetts. He was conducting litigation in Massachusetts. He was there for all purposes of that litigation. Having invoked the jurisdiction of the federal court and submitted to it he may not claim that he was present only for the limited objectives of his answer and counterclaim. He was present, so to speak, for all phases of the suit. That presence satisfies the venue provision of § 4 of the Clayton Act for the purpose of this amendment. The Rules of Civil Procedure are applicable to removed cases and "govern all procedure after removal." Rule 81(c). They permit joinder of claims (Rule 18) and contain the procedure for amendment of pleadings. Rule 15. And, as we have noted, Congress has directed the District Court after a case has been removed to "proceed therein as if the suit had been originally commenced in said district court." Judicial Code § 38, 28 U. S. C. § 81. There can be no doubt but that the court had the power under that statute and under the Rules to permit the joinder of the cause of action under the Clayton Act. If petitioner was subject to the jurisdiction of the court for purposes of the law suit, including an amendment of the complaint, he certainly was "found" there for the purpose of adding a cause of action under §4 of the Clayton Act. Process is of course a different matter. But under the Rules of Civil Procedure service of an amended complaint may be made upon the attorney[10] (Rule 5)—the procedure which apparently was followed here.

Affirmed.

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[10] See Adam v. Saenger, 303 U. S. 59, 67-68.

SUPREME COURT OF THE UNITED STATES.

No. 707.—October Term, 1942.

Benjamin W. Freeman, Petitioner,
vs.
Bee Machine Company, Inc.
} On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[June 1, 1943.]

Mr. Justice Frankfurter, dissenting.

Congress has power, of course, to authorize a suit arising under federal law to be brought in any of the federal district courts. *Robertson* v. *Labor Board*, 268 U. S. 619, 622. But from the beginning of the federal judicial system, Congress has provided that civil suits can be brought only in the district where the defendant is an inhabitant, except that where federal jurisdiction is based solely upon diversity of the parties' citizenship, suit may be brought in the district of the residence of either the plaintiff or the defendant. Section 51 of the Judicial Code, 28 U. S. C. § 112, derived from § 11 of the Judiciary Act of 1789, 1 Stat. 73, 79. Only in a very few classes of cases has Congress given a strictly limited right to sue elsewhere. *Robertson* v. *Labor Board, supra.* In § 4 of the Clayton Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. § 15, the legislation immediately before us, suits are authorized to be brought "in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . ." Similar provisions, permitting suit where the defendant is "found", appear in the Act of March 3, 1911, § 43, 36 Stat. 1087, 1100, 28 U. S. C. § 104 (suits for penalties and forfeitures), the Act of March 4, 1909, §35, 35 Stat. 1075, 1084, 17 U. S. C. § 35 (suits for copyright infringement), the Act of February 5, 1917, § 25, 39 Stat. 874, 893, 8 U. S. C. § 164 (suits under the immigration laws), the Act of May 27, 1933, tit. I, § 22, 48 Stat. 74, 86, 15 U. S. C. § 77v (suits under the Securities Act of 1933), and the Act of June 6, 1934, § 27, 48 Stat. 881, 902, 15 U. S. C. § 78aa, (suits under the Securities Exchange Act of 1934). In holding that the petitioner was "found" in the district of Massachusetts merely because he

had exercised his statutory right to remove a suit to the federal district court in Massachusetts, the Court, I cannot but conclude, is disregarding the venue requirements of the Clayton Act.

The respondent, a Massachusetts corporation, brought an action for breach of contract in the Superior Court of Essex County, Massachusetts against the petitioner, a resident of Ohio, by serving him personally while at a hotel in Boston. Since there was the requisite diversity of citizenship and jurisdictional amount, the petitioner appeared specially in the state court, removed the cause to the federal district court in Massachusetts, filed an answer and a counterclaim for damages, and moved for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure. Thereafter, on the day before the hearing on this motion, the respondent moved to amend its complaint by adding a cause of action for treble damages under § 4 of the Clayton Act. At that time the petitioner was no longer present in Massachusetts. The district court granted the petitioner's motion for summary judgment, and denied the respondent leave to amend its complaint. The reasons for the court's action appear in its opinion:

"This court has jurisdiction under the anti-trust laws over a nonresident only if he is found in the district or has an agent therein. 15 U. S. C. § 15. The defendant while in the Commonwealth was served with process in a common law action of contract. The plaintiff [respondent] obviously seeks to take advantage of this fact in order to obtain jurisdiction over the person in a suit involving a new and entirely different subject-matter, namely, the enforcement of rights arising under federal statutes. . . . It follows from the foregoing that if the plaintiff is allowed to add the cause of action alleged in its motion, the amended complaint would be subject to successful attack on jurisdictional grounds. . . . The motion is, therefore, denied without prejudice to plaintiff's right to seek redress by suit brought originally in the Federal court." 42 F. Supp. 938, 939.

As in *Camp* v. *Gress*, 250 U. S. 308, 311, therefore, the petitioner objected "not to the jurisdiction of a federal court, but to the jurisdiction over him of the court of the particular district; that is, the objection is to the venue." Such a use of the term "jurisdiction" in the sense of venue is by no means uncommon. See, *e. g.*, *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211-12. Although the record contains no specific objection by the petitioner to the amendment of the complaint by adding the cause of action under the anti-trust laws, the opinion of the

district court recites that the parties "have now been heard upon this [respondent's] motion" to amend the complaint, and that the "question presented is whether this amendment should be allowed." 42 F. Supp. at 939. The petitioner's resistance to the entertainment by the district court of the proposed claim under the Clayton Act must mean that he objected to being sued in the federal district court in Massachusetts because he was not amenable to the process of that court, in other words, because that court was without venue.

In vacating the judgment of the district court, the Circuit Court of Appeals stated: "The fact that in all probability the plaintiff in the case at bar could not bring a separate action under the anti-trust laws against the defendant in the district court sitting in Massachusetts because the defendant could avoid the service of process upon him by remaining outside of the district cannot affect the jurisdiction of the court to allow the amendment. This is only a fact to be considered by the district court in exercising its discretionary power to allow or disallow the amendment. Since the court below did not exercise its discretionary power but ruled that it lacked jurisdiction to allow the amendment we must remand to that court for further proceedings." 131 F. 2d 190, 194-95. The Circuit Court of Appeals plainly did not regard the petitioner as having waived his objection to the "jurisdiction" or venue of the district court in Massachusetts. It placed its reversal of the district court on another ground, the correctness of which I shall consider later.

Nor can the petition for certiorari, read in its entirety, be construed as an abandonment of the petitioner's objection to the venue of the Massachusetts district court. True enough, the "only question presented" is stated to be "whether a plaintiff may amend his complaint in a removed action so as to state a new and independent cause of action against the defendant which is outside the State Court's jurisdiction." But the text of the petition makes it clear that the petitioner's "jurisdictional" objections included the claim that venue was not properly laid in the Massachusetts district court. On pages 16 and 17, for example, he states:

"The question of venue or jurisdiction of the person is not a matter lightly to be disregarded. It depends upon substantive law. The right of a person to be sued only in the district of which he is an inhabitant is carefully guarded by the general venue statute, Judicial Code, section 51. . . . Now, being 'found' is a

sporadic, temporary thing, very different from being 'an inhabitant.' The petitioner Freeman was 'found' at one particular time and subjected to suit on a cause of action in contract. . . . The original cause of action was removed to the District Court, but this did not make Freeman 'an inhabitant' so that he could be served at any time. The only way in which jurisdiction can be obtained of Freeman in this district for a cause of action under the Antitrust Laws is by having him 'found' here. This result cannot be secured by 'amending' an existing complaint, because it would not only violate the whole theory of venue, but it would be in direct violation of Rule 82 [of the Federal Rules of Civil Procedure], which is superior to Rule 15."

I quite agree with the Court that venue is a privilege that may be waived, that it "may be lost by failure to assert it seasonably". *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168. But the waiver must be actual, not fictitious. There must be a surrender, not resistance. No doubt a party who, having a valid objection to the venue of a suit, pleads to the merits instead of making objection waives his objection. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 385; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 212. Here the petitioner answered the state suit before and not after the respondent sought to amend its complaint to add an exclusively federal cause of action under the anti-trust laws. His defense to the contract claim could not possibly waive any venue objections with respect to a claim subsequently made under the anti-trust laws. One cannot waive an objection which he cannot assert.

The Court relies upon Rules 15 and 18 of the Federal Rules of Civil Procedure, which establish liberal rules for the joinder of causes of action. But these Rules do not dispense with the requirements of venue. Rule 82 explicitly provides that "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." Because causes of action could be joined, if properly brought, does not prove that they are properly brought. A liberal rule regarding joinder of actions does not eliminate the problems of suability created by the various venue provisions. The removal statute itself does not impliedly repeal the multitudinous venue restrictions imposed by Congress. And certainly Rules 15 and 18 did not do so, especially since Rule 82 contains a specific disavowal of such implications.

The provision of the removal statute that once a suit is removed, the district court shall "proceed therein as if the suit had been originally commenced in said district court", § 38 of the Judicial Code, 28 U. S. C. § 81, in no wise extends the jurisdiction or venue of the district court after removal. The provision means only that when a suit is removed to the federal courts, it shall be disposed of in the manner in which business is conducted there. The requirement of federal law that there be a unanimous verdict of the jury, for example, applies even to suits removed from a state court where a majority of eight can render a verdict. See *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211. Of course, therefore, the Federal Rules of Civil Procedure are equally applicable to suits removed to the federal courts. Rule 81(c). But the venue restrictions imposed by federal legislation and left undisturbed by the Rules are not eliminated merely because the suit is one which has been removed. The venue of the federal court is the same, whether the suit be originally instituted in or removed to the federal court. It certainly is not enlarged by the fact of removal.

Joinder is permissible only if the causes of action are properly in court, that is, if the requirements of venue as well as jurisdiction are satisfied. If these requirements are not met, an order of court directing joinder cannot dispense with them. The respondent here sought to add a cause of action for treble damages under § 4 of the Clayton Act—a cause of action over which the district court in Massachusetts could have venue only if the petitioner resided in Massachusetts, or was found there either in person or through an accredited agent. But at the time of the proposed amendment to the complaint seeking to add this claim, the petitioner was not a resident of Massachusetts nor can he be said to have been "found" there in any legitimate sense of the word. His only contact with Massachusetts was the fact that he was a defendant in an action for breach of contract brought in a Massachusetts state court and properly removed to the federal district court there. If the respondent had instituted a separate suit in Massachusetts against the petitioner under the anti-trust laws, neither the state court, *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436, 440, nor the federal court in Massachusetts could entertain the suit on the ground that the petitioner was "found" there merely because he was a defendant to the contract suit.

I know of no case which has construed the requirement of "found", as applied to a natural person, to mean anything less than actual physical presence. The *Neirbo* case is obviously without relevance here. The problem there was that of fitting a fictive personality into legal categories designed for natural persons. A corporation is never "found" anywhere except metaphorically. In recognition of this fact the *Neirbo* case held that when a corporation assents to the conditions governing the doing of business within a state, it is as much "found" there for purposes of federal law as for those of state law. But in the case of a natural person, he can be "found" not metaphorically but physically. And when a person is not actually physically present in a place, he is not, "so to speak", "found" there except in the world of Alice in Wonderland.

The case therefore reduces itself to this: if the petitioner had not removed the action for breach of contract to the federal court, he could not possibly be compelled to defend a suit under the anti-trust laws brought against him in Massachusetts. His mere exercise of the right of removal given him by Congress has resulted in his being made subject to suit in a place other than that specified by Congress in § 4 of the Clayton Act. This is to add to the removal privilege a condition of hardship which Congress itself has not imposed for the simple reason that it runs counter both to the underlying assumption of diversity jurisdiction and to the historic rule that the "jurisdiction of a district court *in personam* has been limited to the district of which the defendant is an inhabitant or in which he can be 'found'". *Robertson* v. *Labor Board*, 268 U. S. 619, 627. The Court invokes no policy of judicial administration which could warrant disregard of this long established legislative policy.

The derivative nature of removal jurisdiction, see *Minnesota* v. *United States*, 305 U. S. 382, 389, is not based upon technical rules of law. Congress deemed it fair and just that a nonresident who is being sued outside his state should be able to transfer the suit to a neutral federal court without losing or gaining any privileges by such transfer. The decision in this case turns an opportunity given by Congress to assure fairness and impartiality into a Hobson's choice. By removing a suit to the federal court a defendant is subjected to a liability—namely, to be sued in a district where he is neither a resident nor found, under a statute providing that he can be sued only where he is either

a resident or found—from which he would be free if he rems
in the state court. In other words, the right of removal is
tailed by depriving a defendant of territorial immunities
suit given by Congress in the enforcement of federal statutes,
sumably because it deemed place for suit important in a cou
having the dimensions of a continent.

Mr. Justice ROBERTS, Mr. Justice REED and Mr. Justice JAC
join in this dissent.